Supreme Court, U. S.
FILED
OCT 18 1978
MICHAEL RODAK, JR., CLERK

No. 78-190

In the Supreme Court of the United States

OCTOBER TERM, 1978

ELI LILLY AND COMPANY, PETITIONER

v.

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, and UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 27-52) is reported at 574 F.2d 904. The opinion of the district court (Pet. App. 53-66) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1978. A petition for rehearing was denied on June 30, 1978. The petition for a writ of

certiorari was filed on August 2, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether a statutorily required contractual provision granting the Comptroller General access to "directly pertinent" records "involving transactions related to this contract" permits the Comptroller General to examine records relevant to the pricing of and cost of producing items furnished under the contract.

STATEMENT

In 1973 petitioner entered into six negotiated fixed-price contracts[1] for pharmaceutical products with the Defense Supply Agency of the Defense Department. The total contract price was approximately $850,000. In January 1974 petitioner entered into a similar contract with the Veterans Administration. The contract price was in excess of $5.1 million (Pet. App. 54). As required by statute,[2] all seven contracts contained the following "access-to-records" provision (Pet. App. 56):

[1] A negotiated government contract is a statutorily authorized method of procurement that may be used in situations where the formal public advertising and competitive bidding procedure is deemed impracticable or unnecessary. See 10 U.S.C. 2304(a); 41 U.S.C. 252(c).

[2] The relevant statutory provisions (Pet. App. 67) are 10 U.S.C. 2313(b), governing the Defense Department contracts, and 41 U.S.C. 254(c), governing the VA contract.

> [Petitioner] agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment under this contract * * *, have access to and the right to examine any directly pertinent books, documents, papers, and records of [petitioner] involving transactions related to this contract.

In late 1972 the General Accounting Office began a study of "the pharmaceutical industry, its production process, efficiency, costs and profits" (Pet. App. 58-59). Petitioner and five other pharmaceutical companies permitted GAO officials to visit and inspect company facilities and operations, but all six companies refused access to detailed cost records pertaining to specific products. In August 1974 the Comptroller General sent letters to the six companies. Invoking his rights under contractual provisions like that reproduced above, he asked for "access to * * * cost and pricing records on individual products purchased under specified contracts" (Pet. App. 59). The Comptroller General's letter to petitioner was based on the "access-to-records" provisions in the seven contracts described above. The Comptroller sought to examine (Pet. App. 60):

> all books, documents, papers, and other records directly pertinent to the contracts, which include, but are not limited to (1) records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs, (2) support for prices charged to the Government, and (3) such other information as may

be necessary for use to review the reasonableness of the contract prices and the adequacy of the protection afforded the Government's interests.

Petitioner responded to the Comptroller General's request by filing this lawsuit in the United States District Court for the Southern District of Indiana. Petitioner sought to enjoin the Comptroller General from examining (Pet. App. 28):

> (a) Lilly records of experienced costs including costs of direct materials, direct labor, overhead, and other pertinent corporate costs,
>
> (b) Lilly records supporting prices charged to the Government, and
>
> (c) other Lilly records containing information for use by the Comptroller to review the reasonableness of the Lilly contract prices.

The United States intervened as a defendant and filed an answer and counterclaim seeking a declaration that the disputed contractual provisions authorized access as requested by the Comptroller General (Pet. App. 29).

The district court found (Pet. App. 61-63) that the Comptroller General had two purposes for seeking access to petitioner's records: first, "to review contract pricing by the Government's suppliers * * * of drug items to determine the adequacy of the protection afforded the Government by the negotiation techniques used by the procuring agencies," and second, to conduct a general research study on the economics of the pharmaceutical industry. The court ruled that neither purpose is legitimate and that the statutorily

required "access-to-records" provision in negotiated contracts is intended only "to permit audits of the negotiations and performance of particular contracts awarded by negotiation" (Pet. App. 63).

The court held further that the records requested by the Comptroller General "do not directly pertain to, and involve transactions relating to, the particular types of negotiated contracts involved in this suit" (Pet. App. 64). Because the seven contracts at issue were all fixed-price contracts, under which the prices paid by the government were determined not on a "cost-plus" basis but by reference to petitioner's standard catalog prices (Pet. App. 55, 64-65),[3] the district court ruled that the Comptroller General is not entitled to examine records relating to petitioner's "costs of production, profits or methodology by which [petitioner] establishes its prices, including its standard catalog prices" (Pet. App. 64). In addition, the court decided, even if cost and pricing records were relevant to the kind of negotiated contracts involved here, the Comptroller's request would still be too broad because it "encompasses records relating to non-allocated and non-allocable costs, including general administrative costs, marketing costs, and research and development costs, which [petitioner] does

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[3] Six of the contracts were awarded to petitioner because petitioner offered prices lower than its standard wholesale commercial catalog prices (Pet. App. 55). The seventh contract was awarded to petitioner because the Buy-American Act, 41 U.S.C. 10a-10c, precluded acceptance of the other offer received and because petitioner's offer was "fair and reasonable" in comparison with the other offer (*ibid.*).

not assign or allocate to particular products or contracts, and which are incurred without relation to a particular product or contract" (Pet. App. 64-65).

Accordingly, on cross motions for summary judgment, the district court sustained the Comptroller General's right to examine those records that would enable him to determine (Pet. App. 65):

> (a) [Petitioner's] standard catalog prices for the products purchased under the specified contracts;
>
> (b) That the prices of the products purchased were based upon established catalog or market prices of commercial items sold in substantial quantities to the general public; and
>
> (c) That the prices received by the government under the contracts were equal to or less than the catalog prices.

The court refused, however, to permit the Comptroller General to inspect any of petitioner's records other than those falling within this description (Pet. App. 66). In particular, the court denied access to petitioner's cost records and pricing records.

A divided panel of the court of appeals reversed (Pet. App. 27-52).[4] The court found (Pet. App. 35, 44-45) that Congress chose to require "access-to-records" provisions in negotiated contracts in order to facilitate inquiry into the government's treatment under such contracts and thus to help ensure that

[4] The dissenting judge adopted the reasoning of the district court and incorporated the district court's findings of fact and conclusions of law as an appendix to his opinion (Pet. App. 51).

the government's use of this procurement method does not result in excessively high prices. The court held that the Comptroller General's reasons for requesting petitioner's records conformed with this legislative purpose and that the records sought by the government pertain directly to the seven negotiated contracts at issue. The court explicitly adopted the Comptroller General's argument that " 'it is hard to imagine anything more directly related to a contract than the cost of producing the items covered by it or the matters going into the makeup of the price' " (Pet. App. 42). This is equally true, the court said, whether or not all of petitioner's costs are assigned to particular contracts or products (*ibid.*).[5] The court stressed that the government had recognized petitioner's need for confidentiality in connection with some of its business information and had therefore included in its proposed order a paragraph designed to minimize the possibility that data obtained from petitioner's records would be released in a form permitting attribution to petitioner (Pet. App. 49-50; App., *infra*, 3a-5a). In remanding with instructions to enter summary judgment for respondents, the court of appeals directed the district court to include in its

[5] The court acknowledged that "it might be possible to argue in other industries that costs such as research and development have such a small impact that they are not 'directly pertinent' to the contract and its price" (Pet. App. 42). The court concluded, however, that "research and other costs not immediately attributable to one product form such a large portion of the costs of a pharmaceutical product that their import to such a contract seems inescapable" (*ibid.*).

order the confidentiality provisions proposed earlier by the government (Pet. App. 51).

ARGUMENT

The court of appeals' decision correctly interprets the contractual "access-to-records" provisions and their statutory origins, is consistent with the only other court of appeals' decision on point, and does not warrant review by this Court.

1. Petitioner contends (Pet. 13-17) that the Comptroller General demanded access to its records in order to collect data for a research study of the pharmaceutical industry. Petitioner further contends that this is an improper purpose for an exercise of the Comptroller's rights under the contractual provisions here at issue. It is not at all clear that petitioner is entitled to raise such a challenge to the Comptroller General's inspection demand. The Comptroller General seeks to examine records that petitioner has voluntarily and unconditionally agreed to make available to him. It is doubtful, therefore, that petitioner is free to question the Comptroller General's motives in asserting his rights under the negotiated contracts.

In any event, however, the district court and the court of appeals found that the government requested petitioner's cost records and other materials because it wished to review negotiated contract prices for various drugs in order to determine whether procurement of pharmaceuticals by the negotiated contract method is in the government's best interest (Pet. App.

31, 35, 61-62). The legislative history of the relevant statutes demonstrates that Congress required inclusion of "access-to-records" provisions in negotiated contracts precisely in order to aid the Comptroller General in conducting such investigations.

In 1951 Congress amended the Armed Services Procurement Act of 1947 and the Federal Property and Administrative Services Act of 1949 to require insertion of "access-to-records" provisions in all government contracts negotiated under those statutes.[6] 65 Stat. 700. The amendment was intended, *inter alia*, to act "as a deterrent to those persons who otherwise might abuse the authority to negotiate certain contracts without advertising." S. Rep. No. 603, 82d Cong., 1st Sess. 4 (1951). In discussing the amendment's predecessor, a temporary measure enacted in the last days of the previous Congress, Representative Celler stated that the "access-to-records" provision in negotiated contracts would help prevent fraud and overreaching and would also be useful "on

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[6] The new law required contractual provisions that would provide access not only to the contractor's books, documents, papers, or records, but also to similar materials in the possession of subcontractors (Pet. App. 67). (Petitioner agreed that, if it entered into any subcontracts in connection with the performance of its duties under the seven contracts here at issue, it would include in those subcontracts a provision guaranteeing the Comptroller General's access to the subcontractor's pertinent records (Pet. App. 29).) Congress would have had no reason to require such provisions for subcontractors if it did not contemplate an investigation of the costs incurred by contractors supplying the government under negotiated contracts, including negotiated fixed-price contracts.

the question of renegotiation." 96 Cong. Rec. 17123 (1951). Representative Hardy, the sponsor of the 1951 amendment, stated that the bill was intended "to provide a deterrent to improprieties and wastefulness in the negotiation of contracts." [7] 97 Cong. Rec. 13198 (1951).

This legislative history makes plain that Congress envisioned and sought to encourage detailed government inquiry into the economic efficiency of the negotiated contract procurement method. Such inquiry requires access to suppliers' cost records. Only through examination of such records will the Comptroller General be able to determine whether the government should continue to procure particular items under negotiated contracts or whether some other procurement method (*e.g.*, formal advertising and competitive bidding) might permit the government to obtain the same items at reduced expense.

Because it is plainly legitimate for the Comptroller General to investigate the cost basis of petitioner's

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[7] Representative Hardy offered an example of the kind of practice the 1951 amendment was designed to eliminate.

> We found one situation where the Government was buying parts from an automobile dealer who, in turn, was getting them from a parts distributor who, in turn, was getting them from a small tool shop. Naturally, the price paid by the Government included profits upon profits and completely wasteful administrative and handling costs. It would be difficult, if not impossible, for GAO to detect such a situation without the right afforded in this bill.

97 Cong. Rec. 13198 (1951).

prices under the negotiated contracts, it is immaterial that he may be preparing simultaneously a study of the pharmaceutical industry in response to the request of a congressional subcommittee. Although the court of appeals determined that such a study alone would justify the Comptroller General's exercise of his rights under the contractual "access-to-records" provisions (Pet. App. 35-39), it is unnecessary to resolve that issue in this case. Petitioner agreed to grant access to its records and the Comptroller General is seeking access to those records for the very purpose that impelled Congress to legislate on the subject in 1951. Further inquiry into the Comptroller's motives is inappropriate.[8] See *United States* v. *LaSalle National Bank*, No. 77-365 (June 19, 1978).

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[8] Petitioner argues as if it were beyond question that the Comptroller had at least one "improper" motive in seeking access to the records (Pet. 13-16), and that the case thus conflicts with *Lynn* v. *Biderman*, 536 F.2d 820 (9th Cir.), cert. denied, 429 U.S. 920 (1976), which petitioner says forbids access to records when the government has both a proper and an improper purpose. Even if petitioner were correct in arguing that the contractual access provisions and the governing statutes do not authorize a research study, it would not follow that access to the records should be barred. Petitioner confuses an "improper" motive with a motive that is perfectly legitimate but not a sufficient ground, standing alone, for access. There has been no suggestion that a research study is forbidden by law or "improper" in any similar way. The most that petitioner can say is that the Comptroller General could not compel private parties to cooperate in such a project. But no principle of law forbids the Comptroller from using, for research study purposes, information lawfully obtained pursuant to some other power. Consequently, petitioner's arguments about the consequences of "improper" pursuits are beside the point.

2. Petitioner argues (Pet. 17-21) that the cost and pricing records sought by the Comptroller General are not "directly pertinent * * * records * * * involving transactions related to" the negotiated contracts. Following the district court's reasoning, petitioner asserts that its costs are not pertinent to the government contracts because the prices in those contracts were set by reference to petitioner's catalog prices, and the catalog prices "were necessarily established long before these particular procurement contracts were even contemplated" (Pet. 18-19). Petitioner also contends that, at the very least, non-allocated costs, such as research and development, marketing, and general administrative costs, are not directly pertinent to the contract prices. Neither aspect of petitioner's argument is persuasive.

The court of appeals correctly concluded (Pet. App. 42) that petitioner's pricing practices, and the cost components of the prices paid by the government, are central to the negotiated contracts here at issue. Although it is undisputed that petitioner based its prices on previously set catalog prices and that petitioner's costs were not a subject of negotiation with the government before the contracts were signed, petitioner's costs are nonetheless critical to an assessment of the advisability of continued government procurement of pharmaceuticals through negotiated contracts. If petitioner's total costs are substantially lower than the prices paid by the government, the Comptroller General may recommend that the De-

fense Department and Veterans Administration adopt different procurement methods in the future.

This reasoning was explicitly adopted by the only other court of appeals that has considered the question presented here. See *Hewlett-Packard Co.* v. *United States*, 385 F.2d 1013 (9th Cir. 1967), cert. denied, 390 U.S. 988 (1968). The court offered the following explanation for its decision to sustain the government's right to inspect the appellant's cost records (385 F.2d at 1016):

> The subject matter of these four [negotiated fixed-price] contracts is the procurement of described property by the Government.
>
> Production costs directly pertain to that subject matter, because if out of line with the contract price, the contract may have been an inappropriate means of meeting this particular procurement need of the Government. While this appraisal could not affect these particular contracts, it could lead to the use of other methods of meeting future procurement needs. Production costs involve transactions relating to the contract, because they encompass business arrangements made by the contractor in obtaining the materials, labor, facilities and the like required by it in fulfilling its commitment with reference to the subject matter of the contract.

All seven contracts involved in this case were executed several years after the *Hewlett-Packard* decision. That decision fully conformed with the government's consistent interpretation of the now-disputed contract language. Petitioner does not suggest

that at the time it entered into the seven negotiated contracts it was unaware of either the government's construction of the "access-to-records" provisions or the court of appeals' reading of an identical provision in *Hewlett-Packard*. Under these circumstances, petitioner should not now be heard to complain that the contracts it was unaware of either the government's Comptroller General's demand to inspect cost and pricing records exceeds his rights under the negotiated contracts. See *Bowers Dredging Co.* v. *United States*, 211 U.S. 176, 188 (1908); 3 A. Corbin, *Contracts* § 537, at 45; § 556, at 243 (1960). Moreover, the Comptroller's interpretation of the contract language is based on his construction of the statutes that require inclusion of such language in negotiated contracts. This Court and other federal courts have directed that deference be paid to the interpretation given a statute by the officers or agency charged with its administration. See, *e.g.*, *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *Natural Resources Defense Council, Inc.* v. *Train*, 510 F.2d 692, 706 (D.C. Cir. 1975).

Petitioner is incorrect in asserting that "the *Hewlett-Packard* court refused to grant * * * access to general records relating to indirect costs such as research and development, marketing and general administrative costs" (Pet. 20). The issue was simply not litigated in the earlier case. Here, the court of appeals correctly held (Pet. App. 42-43) that the Comptroller General's access to particular cost records should not depend on whether petitioner allocates the costs reflected in those records to individual

products or individual contracts. Petitioner's non-allocated costs apparently are a large percentage of its total costs (see note 5, *supra*) and, accordingly, the Comptroller's ability to evaluate the effectiveness of the negotiated contract procurement method would be seriously impaired if he were denied the opportunity to examine non-allocated costs. As the court of appeals accurately observed (Pet. App. 43):

> The mere fact that, as plaintiff asserts, it does not or even could not allocate costs such as research and development to an individual contract does not undercut the proposition that those costs are directly pertinent to an individual contract but merely indicates that they are directly pertinent to more than one individual contract.[9]

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[9] Petitioner has cited four other cases, now pending in the district courts, that arose from the Comptroller General's efforts to inspect drug company records under contractual "access-to-records" provisions (see Pet. 7 n.4). In *Bristol Laboratories* v. *Staats*, 428 F.Supp. 1388 (S.D.N.Y.), appeal docketed, No. 77-6153 (2d Cir. 1977), the court of appeals has remanded the case to the district court for consideration of Bristol's request for a protective order. Although the access granted the Comptroller General in *Bristol* is arguably more limited than that authorized by the court of appeals here, the district court in *Bristol* did agree that resolution of the access issue "should not depend entirely on a contractor's bookkeeping method, i.e., whether it does or does not assign particular costs to particular contracts or products" (428 F.Supp. at 1391). Rather, the court ruled that Bristol should make available to the Comptroller General "all records relating to manufacturing costs and the pricing of the products sold to the government" (*ibid.*). Whether as a practical matter there will be any difference between the scope of the order entered by the district court in *Bristol* and the order contemplated by the court of appeals in this case remains to be seen. Because the *Bristol* order has not yet been reviewed by the court of

3. Finally, petitioner contends (Pet. 21-23) that the court of appeals should not have directed the district court to enter summary judgment for the government. This argument is incorrect. The court of appeals' construction of the contractual "access-to-records" provisions is a matter of law, and no issue of material fact remains in the case.

Petitioner maintains that "[t]he most important remaining issue concerns other purposes of the Comptroller General's demand for access" (Pet. 21). But, as demonstrated above (see pages 8-11, *supra*), the Comptroller's purpose in seeking petitioner's cost records is proper, and any additional purposes he may have had are immaterial to the legitimacy of his request. *United States* v. *LaSalle National Bank*, *supra*, slip op. 17-19. The other "remaining factual issue" identified by petitioner is "whether the Comptroller General will exceed the scope of his authority once access to [petitioner's] records is granted" (Pet. 22). This question has no bearing on the propriety of summary judgment for the government. The Comptroller's access to petitioner's records will be limited by the district court's order and by the contractual "access-to-records" provisions. The court of appeals

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appeals, any discrepancy is purely speculative and therefore does not provide sufficient reason for this Court now to grant the review that petitioner seeks. (In *United States* v. *Abbott Laboratories*, No. 75 C 2345 (N.D. Ill. Apr. 24, 1978), another of the district court cases cited by petitioner, the court granted summary judgment for the government in reliance on the court of appeals' decision in this case. On July 24, 1978, the district court denied Abbott's motion to alter or amend the judgment.)

explicitly directed the district court to include in its order the government's proposed paragraph designed to safeguard the confidentiality of petitioner's records. If, after entry of summary judgment for the government, the Comptroller General tries to exceed his authority under the court's order, petitioner will be free to return to the district court and seek further relief.

Fountain v. *Filson*, 336 U.S. 681 (1949), on which petitioner relies, does not support its position. In that case, this Court reversed the court of appeals' grant of summary judgment because the appellate court's decision was based "on a new issue as to which the opposite party had no opportunity to present a defense before the trial court" (*id.* at 683). The court of appeals there erred in depriving petitioner of any chance "to dispute the facts material" to the new issue (*ibid.*). By contrast, in this case the court of appeals ruled on precisely the legal issue that had been considered by the district court—the proper construction of the "access-to-records" provisions in the negotiated contracts. When the court of appeals reached a different legal conclusion, there was no occasion for a remand for further factual development. As Professor Moore has written, "*Fountain* v. *Filson* * * * does not deny the existence of appellate power to dispose of a case in accordance with the law and the facts; and under certain circumstances this will include a reversal with directions to enter judgment for the appellant." 6 *Moore's Federal Practice* ¶ 56.27[2], at 56-1562 (2d ed. 1976).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1978

APPENDIX

IMPLEMENTING PARAGRAPHS OF PROPOSED ORDER GRANTING ACCESS TO CONTRACTOR'S RECORDS

IT IS ORDERED,

That the Comptroller General of the United States and his duly authorized representatives have the right to examine all books, documents, papers, or records directly relating to the pricing and cost of producing items furnished by plaintiff Lilly under the following contracts numbered: V797P-5169(C), DSA120-74-C-1401, DSA120-74-C-0125, DSA120-74-C-1639, DSA 120-74-C-0896, DSA120-74-C-1176 and DSA120-74-C-1640, including, but not limited to, records of experienced costs, including costs of direct materials, labor, overhead, and other corporate costs, records in support of prices charged by the plaintiff and all other data and records of Lilly concerning activities and operations of said company which were involved in any way with the incurrence of costs in furnishing the items produced pursuant to said contracts, and it is

FURTHER ORDERED,

That the plaintiff, Lilly, its officers, agents, servants, attorneys, employees and all persons in active concert or participation with them who receive actual notice of an order by personal service or otherwise, are enjoined from preventing the duly authorized representatives of the Comptroller General of the United

States from obtaining access to and examining any books, documents, papers, or records of the plaintiff that relate to and involve transactions relating to the pricing and cost of producing the items which were furnished by plaintiff Lilly, pursuant to the above-mentioned contracts; and plaintiff Lilly, including its officers and subordinates, are directed to have available on the premises of Lilly, Indianapolis, Indiana, and its other principal offices wherever located, such books and records at a time and date to be fixed by the Court upon application of the Comptroller General of the United States or his duly authorized representatives, and it is

FURTHER ORDERED,

That the plaintiff, Lilly, its officers, agents, servants, attorneys, employees and all persons in active concert or participation with them who receive actual notice of an order by personal service or otherwise are enjoined from preventing the duly authorized representatives of the Comptroller General of the United States from obtaining access to and examining any books, documents, papers, or records of plaintiff Lilly that relate to and involve transactions relating to pricing and experienced costs including costs of direct materials, labor, overhead, and other corporate costs, support for prices charged the Government, and other information which would permit representatives of the Comptroller General of the United States to review the contract prices provided for in the aforesaid contracts, and it is

FURTHER ORDERED,

That every book, report, papers, record, and other document (all hereinafter referred to as "document"), designated as confidential by Lilly or any of its divisions or subsidiaries and provided or otherwise made available to the Comptroller General or any of his successors, agents, employees, or subordinates (all hereinafter referred to as "the Comptroller General"), and every summary thereof and extract therefrom, and all data and information contained therein, including accountants' workpapers (all hereinafter referred to as "data"), shall be held in confidence and shall not be provided or otherwise made available by the Comptroller General to any person or agency outside the General Accounting Office except as provided in subparagraphs (a), (b), and (c), below. No copies of Lilly's documents shall be included in accountants' workpapers without the approval of Lilly.

Any document and data referred to in the above paragraph shall be used by the Comptroller General solely for the purpose of a contract study. Upon completion of that study, the Comptroller General shall immediately return to Lilly all documents described in that paragraph. Any data in which Lilly, any of its divisions or subsidiaries, or any product manufactured or sold by any of them are or may be directly or indirectly identified which the Comptroller General deems it necessary to retain shall be retained by the General Accounting Office and deposited with and maintained by the Comptroller General under secur-

ity measures to be agreed upon by the parties. Access to such data by any person shall be permitted only upon written authorization of the Comptroller General, and as limited in the subparagraphs following next denominated a, b, and c.

(a) Any of the data referred to in the above paragraphs may be published, provided to, or otherwise made available to a person or agency outside the General Accounting Office if the data are published, provided, or made available in such a way that any direct or indirect identification of Lilly, any of its divisions or subsidiaries, or any product manufactured or sold by any of them, is not reasonably possible. Lilly shall be afforded a reasonable opportunity to examine and offer its comments regarding any data considered for release, including any report issued by the Comptroller General that includes such data, before release of the data or report.

(b) The Comptroller General may comply without regard to the limitations of this Order set forth above, with an official written request for any of the data referred to above submitted to him by either House of Congress, or any committee of the House of Representatives or the Senate, or any joint committee of the two Houses, having jurisdiction over the subject matter of the study referred to in the Affidavit of Gregory J. Ahart filed in this action, to the extent authorized and directed by law. The Comptroller General will cause prompt notice of any such request to be given to Lilly and to this Court at least seven

calendar days prior to furnishing the data requested, and it is

FURTHER ORDERED,

That the Comptroller General and the United States shall notify Lilly promptly of any request for disclosure, subpoena *duces tecum*, civil action, or other order or application for an order seeking production, release, or disclosure of any data referred to above, and further agree to use their best efforts to protect the confidentiality of of such data, except as provided above, including resort to appropriate judicial remedies and cooperation with Lilly in such efforts, * * *.

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